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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,)	Criminal Case No. 08CR1444DMS
)	
Plaintiff,	)	DATE: June 13, 2008
	)	TIME: 11:00 a.m.
v.	)	Before Honorable Dana M. Sabraw
)	
JOSE ALFREDO AGUILAR-PEDRASA,	)	UNITED STATES' RESPONSE TO
	)	DEFENDANT'S MOTIONS TO:
Defendant(s).)	
	)	(1) COMPEL DISCOVERY; AND
	)	(2) LEAVE TO FILE FURTHER
	)	MOTIONS
)	
	)	TOGETHER WITH STATEMENT OF
	)	FACTS AND MEMORANDUM
	)	OF POINTS AND AUTHORITIES

COMES NOW the plaintiff, UNITED STATES OF AMERICA, by and through its counsel,
 Karen P. Hewitt, United States Attorney, and Aaron B. Clark, Assistant U.S. Attorney, and hereby
 files its Response to Defendant's motions in the above-referenced case. Said Response is based
 upon the files and records of this case together with the attached statement of facts and
 memorandum of points and authorities.

1 DATED: May 30, 2008.

2 Respectfully submitted,

3 KAREN P. HEWITT
4 United States Attorney

5 s/ Aaron B. Clark
6 AARON B. CLARK
7 Assistant United States Attorney
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JOSE ALFREDO AGUILAR-PEDRASA,)	UNITED STATES' STATEMENT OF
)	FACTS AND MEMORANDUM OF
Defendant(s).)	POINTS AND AUTHORITIES
_____)	

I

STATEMENT OF THE CASE

The Defendant, Jose Alfredo Aguilar-Pedrasa (hereinafter "Defendant"), was charged by a grand jury on May 7, 2008 with violating Title 8 U.S.C. 1326(a) and (b), Deported Alien Found in the United States. Defendant was arraigned on the Indictment on May 8, 2008, and entered a plea of not guilty.

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II**STATEMENT OF FACTS****A. IMMIGRATION HISTORY**

Defendant is a Mexican citizen who was ordered deported after a hearing before an immigration judge on January 27, 2000. He was most recently removed from the United States on February 12, 2008.

B. RAP SHEET SUMMARY CHART

CONVICT DATE	COURT OF CONVICTION	CHARGE	TERM
12/29/2004	CASC Los Angeles	HS 11351.5 – Poss/Purchase Cocaine Base for Sale	5 Years
2/19/2002	CASC San Fernando	VC 12500(A) – Driving w/o License	6 Days
5/4/2001	CASC Los Angeles	HS 11351.5 – Poss/Purchase Cocaine Base for Sale	180 Days
12/6/02	CASC Los Angeles	HS 11351.5 – Poss/Purchase Cocaine Base for Sale	3 years

C. INSTANT OFFENSE

On March 27, 2008, Border Patrol Agent Jamison Walthall was performing line watch duties in an area near Campo, California, approximately 20 miles east of the Tecate, California, Port of Entry and approximately ½ mile north of the International Border with Mexico. In the course of his duties, Agent Walthall responded to a seismic intrusion device in the area. When he arrived at the area of the device activation, Agent Walthall found fresh footprints, which he followed. He ultimately found seven people attempting to hide in surrounding brush. Defendant was among the seven.

As Agent Walthall approached the seven people, he identified himself as a Border Patrol Agent and questioned each person regarding their citizenship and immigration status. Defendant freely admitted he was a Mexican citizen with no documents allowing him to be in the United States legally. Defendant was subsequently arrested and brought to the Campo Station for processing.

At the station, Defendant elected to invoke his Miranda rights.

III

POINTS AND AUTHORITIES

A. DISCOVERY REQUESTS AND MOTION TO PRESERVE EVIDENCE

1. The Government Has or Will Disclose Information Subject To Disclosure Under Rule 16(a)(1)(A) and (B) Of The Federal Rules Of Criminal Procedure

The government has disclosed, or will disclose well in advance of trial, any statements subject to discovery under Fed. R. Crim. P. 16(a)(1)(A) (substance of Defendant's oral statements *in response to government interrogation*) and 16(a)(1)(B) (Defendant's relevant written or recorded statements, written records containing substance of Defendant's oral statements *in response to government interrogation*, and Defendant's grand jury testimony).

a. The Government Will Comply With Rule 16(a)(1)(D)

To the extent he has a criminal record, Defendant has already been provided with his or her own "rap" sheet and the government will produce any additional information it uncovers regarding Defendant's criminal record. Any subsequent or prior similar acts of Defendant that the government intends to introduce under Rule 404(b) of the Federal Rules of Evidence will be provided, along with any accompanying reports, at a reasonable time in advance of trial.

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b. The Government Will Comply With Rule 16(a)(1)(E)

The government will permit Defendant to inspect and copy or photograph all books, papers, documents, data, photographs, tangible objects, buildings or places, or portions thereof, that are material to the preparation of Defendant's defense or are intended for use by the government as evidence-in-chief at trial or were obtained from or belong to Defendant.

Reasonable efforts will be made to preserve relevant physical evidence which is in the custody and control of the investigating agency and the prosecution, with the following exceptions: drug evidence, with the exception of a representative sample, is routinely destroyed after 60 days, and vehicles are routinely and periodically sold at auction. Records of radio transmissions, if they existed, are frequently kept for only a short period of time and may no longer be available. Counsel should contact the Assistant United States Attorney assigned to the case two weeks before the scheduled trial date and the Assistant will make arrangements with the case agent for counsel to view all evidence within the government's possession.

c. The Government Will Comply With Rule 16(a)(1)(F)

The government will permit Defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, that are within the possession of the government, and by the exercise of due diligence may become known to the attorney for the government and are material to the preparation of the defense or are intended for use by the government as evidence-in-chief at the trial. Counsel for Defendant should contact the Assistant United States Attorney assigned to the case and the Assistant will make arrangements with the case agent for counsel to view all evidence within the government's possession.

d. The Government Will Comply With Its Obligations Under Brady v. Maryland

The government is well aware of and will fully perform its duty under Brady v. Maryland, 373 U.S. 83 (1963), and United States v. Agurs, 427 U.S. 97 (1976), to disclose exculpatory evidence within its possession that is material to the issue of guilt or punishment.

Defendant, however, is not entitled to all evidence known or believed to exist that is, or may be, favorable to the accused, or that pertains to the credibility of the government's case. As stated in United States v. Gardner, 611 F.2d 770 (9th Cir. 1980), it must be noted that:

[T]he prosecution does not have a constitutional duty to disclose every bit of information that might affect the jury's decision; it need only disclose information favorable to the defense that meets the appropriate standard of materiality.

611 F.2d at 774-775 (citations omitted). See also United States v. Sukumolachan, 610 F.2d 685, 687 (9th Cir. 1980) (the government is not required to create exculpatory material that does not exist); United States v. Flores, 540 F.2d 432, 438 (9th Cir. 1976) (Brady does not create any pretrial privileges not contained in the Federal Rules of Criminal Procedure).

e. Discovery Regarding Government Witnesses

(1) Agreements. The government has disclosed or will disclose the terms of any agreements by Government agents, employees, or attorneys with witnesses that testify at trial. Such information will be provided at or before the time of the filing of the Government's trial memorandum.^{1/} The government will comply with its obligations to disclose impeachment evidence under Giglio v. United States, 405 U.S. 150 (1972).

(2) Bias or Prejudice. The government has provided or will provide information related to the bias, prejudice or other motivation to lie of government trial witnesses as required in Napue v. Illinois, 360 U.S. 264 (1959).

(3) Criminal Convictions. The government has produced or will produce any criminal convictions of government witnesses plus any *material* criminal acts which did not result in conviction. The government is not aware that any prospective witness is under criminal investigation.

¹ As with all other offers by the government to produce discovery earlier than it is required to do, the offer is made without prejudice. If, as trial approaches, the government is not prepared to make early discovery production, or if there is a strategic reason not to do so as to certain discovery, the government reserves the right to withhold the requested material until the time it is required to be produced pursuant to discovery laws and rules.

1 (4) Ability to Perceive. The government has produced or will
2 produce any evidence that the ability of a government trial witness to perceive, communicate or
3 tell the truth is impaired or that such witnesses have ever used narcotics or other controlled
4 substances, or are alcoholics.

5 (5) Witness List. The government will endeavor to provide
6 Defendant with a list of all witnesses which it intends to call in its case-in-chief at the time the
7 government's trial memorandum is filed, although delivery of such a list is not required. See
8 United States v. Dischner, 960 F.2d 870 (9th Cir. 1992); United States v. Culter, 806 F.2d 933,
9 936 (9th Cir. 1986); United States v. Mills, 810 F.2d 907, 910 (9th Cir. 1987). Defendant,
10 however, is not entitled to the production of addresses or phone numbers of possible
11 government witnesses. See United States v. Thompson, 493 F.2d 305, 309 (9th Cir. 1977),
12 cert. denied, 419 U.S. 834 (1974). Defendant has already received access to the names of
13 potential witnesses in this case in the investigative reports previously provided to him or her.

14 (6) Witnesses Not to Be Called. The government is not required to
15 disclose all evidence it has or to make an accounting to Defendant of the investigative work it
16 has performed. Moore v. Illinois, 408 U.S. 786, 795 (1972); see United States v. Gardner,
17 611 F.2d 770, 774-775 (9th Cir. 1980). Accordingly, the government objects to any request by
18 Defendant for discovery concerning any individuals whom the government does not intend to
19 call as witnesses.

20 (7) Favorable Statements. The government has disclosed or will
21 disclose the names of witnesses, if any, who have made favorable statements concerning
22 Defendant which meet the requirements of Brady.

23 (8) Review of Personnel Files. The government has requested or
24 will request a review of the personnel files of all federal law enforcement individuals who will
25 be called as witnesses in this case for Brady material. The government will request that
26 counsel for the appropriate federal law enforcement agency conduct such review. United
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1 States v. Herring, 83 F.3d 1120 (9th Cir. 1996); see, also, United States v. Jennings, 960 F.2d
2 1488, 1492 (9th Cir. 1992); United States v. Dominguez-Villa, 954 F.2d 562 (9th Cir. 1992).

3 Pursuant to United States v. Henthorn, 931 F.2d 29 (9th Cir. 1991) and United States v.
4 Cadet, 727 F.2d 1452 (9th Cir. 1984), the United States agrees to “disclose information
5 favorable to the defense that meets the appropriate standard of materiality . . .” United States v.
6 Cadet, 727 F.2d at 1467, 1468. Further, if counsel for the United States is uncertain about the
7 materiality of the information within its possession in such personnel files, the information will
8 be submitted to the Court for in camera inspection and review.

9 (9) Government Witness Statements. Production of witness
10 statements is governed by the Jencks Act, 18 U.S.C. § 3500, and need occur only after the
11 witness testifies on direct examination. United States v. Taylor, 802 F.2d 1108, 1118 (9th Cir.
12 1986); United States v. Mills, 641 F.2d 785, 790 (9th Cir. 1981)). Indeed, even material
13 believed to be exculpatory and therefore subject to disclosure under the Brady doctrine, if
14 contained in a witness statement subject to the Jencks Act, need not be revealed until such time
15 as the witness statement is disclosed under the Act. See United States v. Bernard, 623 F.2d
16 551, 556-57 (9th Cir. 1979).

17 The government reserves the right to withhold the statements of any particular
18 witnesses it deems necessary until after the witness testifies. Otherwise, the government will
19 disclose the statements of witnesses at the time of the filing of the government’s trial
20 memorandum, provided that defense counsel has complied with Defendant’s obligations under
21 Federal Rules of Criminal Procedure 12.1, 12.2, and 16 and 26.2 and provided that defense
22 counsel turn over all “reverse Jencks” statements at that time.

23 f. The Government Objects To The Full Production Of Agents’
24 Handwritten Notes At This Time

25 Although the government has no objection to the preservation of agents’ handwritten
26 notes, it objects to requests for full production for immediate examination and inspection. If
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1 certain rough notes become relevant during any evidentiary proceeding, those notes will be
2 made available.

3 Prior production of these notes is not necessary because they are not “statements”
4 within the meaning of the Jencks Act unless they comprise both a substantially verbatim
5 narrative of a witness’ assertions *and* they have been approved or adopted by the witness.
6 United States v. Spencer, 618 F.2d 605, 606-607 (9th Cir. 1980); see also United States v.
7 Griffin, 659 F.2d 932, 936-938 (9th Cir. 1981).

8 g. All Investigatory Notes and Arrest Reports

9 The government objects to any request for production of all arrest reports, investigator’s
10 notes, memos from arresting officers, and prosecution reports pertaining to Defendant. Such
11 reports, except to the extent that they include Brady material or the statements of Defendant,
12 are protected from discovery by Rule 16(a)(2) as “reports . . . made by . . . Government agents
13 in connection with the investigation or prosecution of the case.”

14 Although agents’ reports may have already been produced to the defense, the
15 government is not required to produce such reports, except to the extent they contain Brady or
16 other such material. Furthermore, the government is not required to disclose all evidence it has
17 or to render an accounting to Defendant of the investigative work it has performed. Moore v.
18 Illinois, 408 U.S. 786, 795 (1972); see United States v. Gardner, 611 F.2d 770, 774-775 (9th
19 Cir. 1980).

20 h. Expert Witnesses.

21 Pursuant to Fed. R. Crim. P. 16(a)(1)(G), at or about the time of filing its trial
22 memorandum, the government will provide the defense with notice of any expert witnesses the
23 testimony of whom the government intends to use under Rules 702, 703, or 705 of the Fed. R.
24 of Evidence in its case-in-chief. Such notice will describe the witnesses’ opinions, the bases
25 and the reasons therefor, and the witnesses’ qualifications. Reciprocally, the government
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requests that the defense provide notice of its expert witnesses pursuant to Fed. R. Crim. P. 16(b)(1)(C).

i. Information Which May Result in Lower Sentence.

Defendant has claimed or may claim that the government must disclose information about any cooperation or any attempted cooperation with the government as well as any other information affecting Defendant's sentencing guidelines because such information is discoverable under Brady v. Maryland. The government respectfully contends that it has no such disclosure obligations under Brady.

The government is not obliged under Brady to furnish a defendant with information which he already knows. United States v. Taylor, 802 F.2d 1108, 1118 n.5 (9th Cir. 1986), cert. denied, 479 U.S. 1094 (1987); United States v. Prior, 546 F.2d 1254, 1259 (5th Cir. 1977). Brady is a rule of disclosure. There can be no violation of Brady if the evidence is already known to Defendant.

Assuming that Defendant did not already possess the information about factors which might affect their respective guideline range, the government would not be required to provide information bearing on Defendant's mitigation of punishment until after Defendant's conviction or plea of guilty and prior to his sentencing date. "No [Brady] violation occurs if the evidence is disclosed to the defendant at a time when the disclosure remains of value." United States v. Juvenile Male, 864 F.2d 641 (9th Cir. 1988).

F. THE GOVERNMENT DOES NOT OPPOSE LEAVE TO FILE FURTHER MOTIONS SO LONG AS THEY ARE BASED ON NEW EVIDENCE

The Government does not object to the granting of leave to file further motions as long as the order applies equally to both parties and any additional defense motions are based on newly discovered evidence or discovery provided by the Government subsequent to the instant motion.

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V.

CONCLUSION

For the foregoing reasons, the Government respectfully requests that Defendant's motions, except where unopposed, be denied.

DATED: May 30, 2008.

Respectfully submitted,

KAREN P. HEWITT
United States Attorney

s/ Aaron B. Clark
AARON B. CLARK
Assistant United States Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Case No. 08CR1444DMS

Plaintiff

CERTIFICATE OF SERVICE

v.

JOSE ALFREDO AGUILAR-PEDRASA,

Defendant(s).

IT IS HEREBY CERTIFIED THAT:

I, AARON B. CLARK, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

I am not a party to the above-entitled action. I have caused service of UNITED STATES' RESPONSE on the following parties by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

1. Robert Swain

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 30, 2008.

s/ Aaron B. Clark
AARON B. CLARK